STATE OF MICHIGAN

IN THE SUPREME COURT

(ON APPEAL FROM THE COURT OF APPEALS AND
THE CIRCUIT COURT FOR THE COUNTY OF WAYNE)

CHERYCE GREENE, as Personal Representative of the Estate of KEIMER EASLEY, deceased,

Plaintiff-Appellee,

v

A.P. PRODUCTS LIMITED, and
REVLON CONSUMERS PRODUCTS CORPORATION,

Defendants-Appellants (in docket no. 127718),

-AND-

SUPER 7 BEAUTY SUPPLY, INC.,

Defendant-Appellant (in docket no. 127734).

Supreme Court Nos. 127718 and 127734

C.A. No. 249113

L.C. No. 01-125094-NP

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REPLY BRIEF OF A.P. PRODUCTS, LTD. AND REVLON CONSUMERS PRODUCTS CORPORATION IN DOCKET NO. 127718

PROOF OF SERVICE

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TABLE OF CONTENTS

Page

INDEX TO AUTHORITIES

Page

MICHIGAN CASES:

FEDERAL CASES:

STATUTES:

OTHER AUTHORITIES:

STATEMENT OF FACTS

Appellant, A.P. Products, Ltd. and Revlon Consumer Products Corporation, rely on the Statement of Facts set forth in their Brief on Appeal dated December 27, 2005.

STATEMENT OF THE STANDARD OF REVIEW

Appellant, A.P. Products, Ltd. and Revlon Consumer Products Corporation, rely on the Statement of the Standard of Review set forth in their Brief on Appeal dated December 27, 2005.

INTRODUCTION

On January 30, 2006, Plaintiff filed her brief as Appellee in docket no. 127718. Defendants-Appellants, A.P. Products, Ltd. and Revlon Consumers Products Corporation, will reply to those points made in Plaintiff's brief, to which any reply need be made, in this Reply Brief.

ARGUMENT I

AS A MATTER OF LAW, DEFENDANTS-APPELLANTS OWED NO DUTY TO WARN PLAINTIFF THAT SERIOUS INJURIES COULD RESULT FROM PERMITTING HER INFANT TO INGEST THE SUBJECT HAIR CARE OIL BECAUSE AVERAGE USERS OF ORDINARY INTELLIGENCE ARE AWARE OF A GENERAL RISK OF INJURY IF THE PRODUCT IS INGESTED. WHERE, AS HERE, THE RISK OF HARM IS OPEN AND OBVIOUS, THE LAW DOES NOT IMPOSE UPON A MANUFACTURER A DUTY TO WARN OF ALL CONCEIVABLE INJURIES THAT MIGHT OCCUR FROM THE USE OF THE PRODUCT.

The core of Plaintiff's argument appears at pp 4 and 7 of her Brief where she asserts that despite the fact that reasonable persons know and she knew that this product should not be ingested due to, what she calls, knowledge of a "vague risk of injury," the Defendants owed a duty to warn of the risk of death if the product was ingested. For the reasons set forth in their Opening Brief, Defendants-Appellants contend that in order for the open and obvious danger doctrine to apply, and to obviate a duty to provide a warning, there is no requirement that persons in general, or the Plaintiff in particular, who know of a potential danger associated with the use or misuse of a product, be shown to have knowledge that death may result.

Moreover, Defendants-Appellants contend that the principal case relied on by Plaintiff, *Michigan Mut'l Ins Co v Heatilator*, 422 Mich 148; 366 NW2d 202 (1985), and its progeny were overruled by this Court in *Glittenberg v Doughboy Recreational Indust*, 441 Mich 379; 491 NW2d 208 (1992). The *dicta*[1] in *Michigan Mut'l Ins Co v Heatilator*, which is relied on by Plaintiff here is simply no longer the law in Michigan.

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[1] *Dicta* is defined as:

(Continued on next page.)

Michigan Mut'l Ins Co v Heatilator involved a "zero-clearance" fireplace -- *i.e.*, a fireplace having no clearance between the fireplace and abutting combustible materials -- with two air vents, one at the base of the unit and the other at the top. When plaintiff's insured, Mr. Gieger, installed glass doors on the fireplace, he blocked the lower air vent at the front of the unit. As a result, the outer steel shell of the fireplace became overheated and caused a fire. Plaintiff claimed that the defendant was negligent in failing to provide warnings that the air vents should not be blocked because of the risk of fire. The trial court granted summary judgment for the defendant based on Mr. Gieger's deposition testimony that he knew that he should not cover the fireplace's air vents. The Court of Appeals affirmed, holding, in addition, that defendant had no duty to warn because the product was simple and the risks which it posed were obvious to all.

This Court reversed the grant of summary judgment because the record did not support the determination that Mr. Gieger was aware of any danger. He testified that he knew that he was not to cover the fireplace's vents. He never said why. This Court held that his testimony could support two inferences: (1) because he knew that air vents should not be blocked, he knew that blocking them would create a fire hazard; or (2) he knew that the air vents should not be blocked because blocking them would cause the fireplace to lose its function of heating the room by circulating air through the vent. This Court held that the lower courts, in considering summary judgment, were required to accept the latter inference -- which meant that he had no

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> Statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case in hand, are, however illuminating, but *obiter dicta* and lack the force of an adjudication.

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knowledge of any danger -- only knowledge of an adverse effect on the product's functioning. Then, *in dicta*, this Court stated:

> "Even if it is arguable that Mr. Gieger's testimony establishes consciousness on his part of a vague danger, it would not preclude a jury from finding that a warning was nevertheless required to give him a full appreciation of the seriousness of the life-threatening risks involved."

The holding of the Sixth Circuit in *Hollister v Dayton-Hudson Corp*, 201 F3d 731 (6th Cir 2000) is identical to the holding of the Court of Appeals in this case and the holding of the Court of Appeals in *Horen v Coleco Indust*, 169 Mich App 725; 426 NW2d 794 (1988). All rely on the above-quoted statement from *Michigan Mut'l Ins Co v Heatilator* for the proposition that even if a reasonable consumer was aware of a vague danger, that would not preclude a determination that a warning was nonetheless required to give full appreciation of the life-threatening risks involved.

That holding was rejected by this Court in *Glittenberg*. The Plaintiffs in the three consolidated cases in *Glittenberg* argued that while they, and average users of ordinary intelligence, knew of a general risk of injury associated with the use of the product, they, and average users of ordinary intelligence, did not perceive the risk of quadriplegic injury or death and, therefore, the manufacturer owed a duty to warn of the specific, severe consequences. The argument was rejected. This Court stated:

> "The gravamen of each of the plaintiff's argument is that the danger presented is not open and obvious because the specific harm of paralysis or death is not generally recognized.

(Continued from previous page.)
Hett v Duffy, 346 Mich 456; 78 NW2d 284 (1956); *Black's Law Dictionary,* Abridged Sixth Edition, p 313. *See also, United States v State of Michigan*, 882 F Supp 659, 666 (ED Mich 1995) (*dictum* does not constitute the "stuff of binding precedent.")

* * *

> In effect, plaintiffs seek to convert the duty to warn argument by conceding a readily apparent and generally recognized dangerous condition for which no duty exists, while claiming that because a specific consequence or degree of harm from that dangerous condition, i.e., paralysis or death, is not generally recognized, a specific warning is required.
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> * * *
>
> . . . [W]here the facts of record require the conclusion that the risk of serious harm from the asserted condition is open and obvious, and no disputed question exists regarding the danger of the product, the law does not impose a duty upon a manufacturer to warn of all conceivable ramifications of injuries that might occur from the use of foreseeable misuse of the product. As the court observed in *Jamieson, supra* at 39:
>
> > [S]urely a manufacturer, to be protected from liability for negligence, need not enumerate the possible injuries which might befall one . . . ."

Glittenberg, supra at pp 401-402. (Underlining supplied.)

This demonstrates that the holding of the appellate courts in this case, in *Horen* and in *Hollister* are contrary to authority from this Court.

Defendants-Appellants contend that *Glittenberg* correctly states what the law in Michigan is and should be. When people in general know, and a plaintiff in a particular knows, that hair oil should not be ingested and that infants should not be permitted to ingest it because doing so is dangerous, the inquiry ends at that point and the law does not impose a duty on the product manufacturer to warn them of the degree of danger.

ARGUMENT II

THE TRIAL COURT PROPERLY CONCLUDED THAT PLAINTIFF WAS UNABLE TO PRESENT SUFFICIENT EVIDENCE TO CREATE A GENUINE ISSUE OF MATERIAL FACT CONCERNING THE CAUSATION ELEMENT OF HER CAUSE OF ACTION BECAUSE PLAINTIFF WAS AWARE THAT THE PRODUCT WAS HARMFUL IF INGESTED.

At pp 9-10 of her Brief, Plaintiff argues that there is no evidence in the record that she was or was generally expected to be knowledgeable, about the product's ". . . properties, including a potential hazard or adverse effect."

Yet, at p 7 of her Brief, she admits to knowledge that ". . . this is not a product that one would want their child to drink or even taste due to a vague risk of injury in the form of nausea, vomiting or stomach upset . . . ."[2]

MCL 600.2945(j) defines a "sophisticated user" as:

> A person . . . that by virtue of . . . experience . . . is or is generally expected to be knowledgeable about a product's properties, including a potential hazard or adverse effect."

The statute does not require objective ("generally expected to be") or subjective ("is") knowledge of all potential hazards or adverse effects associated with the use of a product. The statute, by its terms, requires only knowledge of ". . . a potential hazard or adverse effect." (Underlining supplied). Plaintiff has admitted that she had that knowledge. She was a "sophisticated user" within the meaning of MCL 600.2945(j).

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[2] Indeed, the Court of Appeals recognized that:

> "In plaintiff's deposition, she testified that she would not have let Kiemer taste the Wonder 8 Oil because it could be harmful to him." Appellants' Appendix, p 45a.

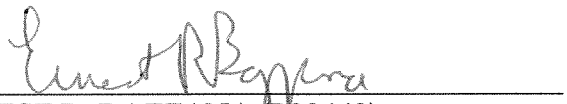
ARGUMENT III

The arguments made by Plaintiff with respect to this Argument were anticipated and addressed by Defendants in their Opening Brief. No reply is necessary and none will be made.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in their Opening Brief dated December 27, 2005, Defendants-Appellants, A.P. Products, Ltd. and Revlon Consumer Products Corporation, contend that the November 23, 2004 decision of the Court of Appeals must be reversed and the grant of summary disposition reinstated.

PLUNKETT & COONEY, P.C.

By: 

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DATED: February 20, 2006